Supreme Court, U. S.
FILED
NOV 21 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

CASE NO. 77-851

MANUEL LOUIS FERNANDEZ,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, for the Fifth Circuit, entered in the above styled cause on August 4, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at_____

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Is it a violation of Defendant's due process rights for the trial court to deny Defendant's Motion for the Divulgement of a Confidential Informant where no claim of privilege had been made by the United States Government, nor any representation made that disclosure of the confidential informant would endanger the Government's interest when the divulgement of same was essential for the interests of justice in that Defendant's Motion to Suppress was dependent upon information which could only be provided through the examination of the confidential informant?

2. Is it a violation of Defendant's due process rights for the trial court to refuse to allow the divulgement of the confidential informant when it was apparent from the record and the testimony of Defendant that the confidential informant had information which would tend to exculpate the Defendant?

3. Is it a violation of Defendant's due process rights, and rights under the Fourth Amendment of the United States Constitution to deny Defendant's Motion to Suppress Evidence seized?

STATEMENT OF THE FACTS

The first witness for the Defendant on the Motion to Suppress and Motion to Divulge Confidential Informant was the Defendant, MANUEL FERNANDEZ. The Defendant testified that he recalled the morning of May 9, 1976. (R 22) He testified that he left a certain residence at or about N.W. 198th Terrace in the morning, carrying his identification and a white plastic bag which said "Tapes" on it. That this plastic bag was from the store located in Key West, Florida. (R 23) Defendant next testified that he got into his car and headed into the direction of LeJeune Road which was 42nd Avenue, going toward the Palmetto Expressway. He at all times, was observing the speed limits and stop signs and ran no red lights. (TR 24)

Defendant next testified that as he got near the Palmetto Expressway and 14th Avenue, when he turned left to go north on the Expressway, three or four unidentified cars pulled rapidly around him in a semi-circle, a voice yelled "stop", he looked around and became frightened. (R 24-25)

In viewing the people that had accosted him, he thought he saw a revolver and tried to get away. (R 25) He testified that he attempted to escape from these individuals and while being chased by them, threw the package marked "Tapes" out of his car window as he was afraid for his life. He testified he believed that that package contained a quantity of money. (R 26)

On cross, the Government asked the Defendant to describe the package. Defendant's response was that it was not transparent and that it wasn't translucent. It was a white plastic, approximately 12 x 12, with money in it.

(R 27) Defendant testified that he threw it out of the vehicle window which was on his side, and threw the package out with his right hand. (R 27) Upon response to the Government's question as to whether or not he had communication with the driver or occupant of one of the cars that was chasing him, Defendant responded that there was no need for conversation, that a gun was pointed at him, and the gun spoke for itself. (R 27-28) Defendant also testified that at that time he had other monies on his person, packaged in a different way. (R 28)

On re-direct examination, Defendant testified that he had come into possession of this package at about 1:00 in the morning when a guy named Juanito and another guy named Pablo asked if the Defendant would take some money down to a friend of his in Key West, known as Julio Mazura. (R 28) He testified he went to sleep, woke up approximately 6:00 in the morning and left at 6:15 a.m. with the monies. (R 29)

On re-cross, the Government adduced that the Defendant had arrived at that residence on 198th Terrace, owned by Pablo Cairo, on or about the 8th day of May, at 4:30 p.m. (R 29) That there was also present on the premises besides Pablo and Juanito, an individual named Danny Guzewich. (R 31) The Government inquired as to the amount of other monies Defendant had in his presence on May 9th and he testified a sum of money in the vicinity of Eight and a Half Thousand ($8,500.00) Dollars. (R 33)

The re-cross of the Defendant was thereupon concluded and the court inquired as to whether or not Pablo and Juanito were under subpoena by the Defendant. Defendant's counsel responded they had been unable to reach Pablo, that his phone had been disconnected, and they had

not been able to locate him at his house. With regard to Juanito, they did not know his full identity and that it was suspected that Juanito was the confidential informant. (R 37-38) The Court then asked the Defendant whether or not he threw out the package containing his own funds. Defendant responded in the negative. (R 38) At which point, the counsel for Defendant asked permission to amplify the answer and Defendant testified that immediately after throwing the first package out of the car, he lost control of the vehicle, and the car flipped, turned over, and caused him to go to the hospital. (R 39) At which point, the defense rested on the Motion to Suppress and the Motion to Produce Confidential Informant. (R 39-40)

The Government called for it's first witness, Special Agent James Harris, of the Drug Enforcement Administration. (TR 40) The witness testified that on the 7th, 8th and 9th days of May, 1976, he was conducting a surveillance as part of a surveillance team in the general vicinity of the residence of one Pablo Cairo. (TR 41) The witness stated that he became involved in the surveillance of the Cairo residence on May 8th at approximately 11:00 p.m. Further, that on May 8th, a cooperating individual had occasion to be in residence, and was in and out of the residence on several occasions. (TR 41-42)

The witness stated that the Defendant arrived at the residence of Mr. Cairo sometime on the evening of May 8th, and remained at the residence until the early morning hours. The witness testified that he remained several hours after the cooperating individual inside the Cairo residence left same. (TR 43)

Mr. Harris further testified that the surveillance continued until 6:30 in the morning when the witness and other

officers followed the Defendant upon his exit from the residence. (TR 44) Mr. Harris stated that the cooperating individual within the residence had informed him that there was a quantity of cocaine present in the Cairo residence which had arrived there shortly after 12:30 a.m. (TR 45) The witness further stated that the confidential informant had stated that the Defendant and another man would be leaving the premises, with the cocaine and that they had customers waiting for them in a motel nearby and that they were going to deliver the cocaine to the customers. (TR 45-46)

At approximately 6:30 a.m., the witness observed the Defendant leave the premises. The witness and other agents had determined that they would follow Mr. Fernandez and cause him to be stopped and frisked as they believed he had in his possession a quantity of cocaine. (TR 50)

Mr. Harris testified that at approximately 6:30 a.m., when the Defendant exited the residence, he was unable to see if the Defendant was carrying anything because his visibility had been blocked. (TR 50) At that point in time the Defendant got into the previously described Jeep and pulled away. He stated that at the outset, the Jeep was parked facing West on 198th Terrace, directly in front of the subject residence, that the Defendant proceeded in that direction for half a block, and then southward for a short block, and then eastbound on 198th street to 42nd avenue and then southbound on 42nd Avenue to 167th Street, where the vehicle turned left to the access road to the Palmetto Expressway. At that time, there were three government vehicles in pursuit of the Defendant. As the Defendant's vehicle reached the Palmetto Expressway, Agent Harris instructed one of the agents to pull past Mr. Fernandez and to cut in front of him, for one agent to drive

along his side, and one to stay behind him in order to effect a stopping. Harris testified that he put a portable blue light on the roof of his car and activated it. (TR 51-52)

The witness then stated the Defendant slowed down and when the agents maneuvered around him, he then made an abrupt turn to the right hitting one agent's car on the left front fender, pushing past that car, and spun into a vacant lot and headed the wrong way on the access road back to 42nd Avenue. (TR 54)

The Defendant then proceeded northbound back on 42nd Avenue where at one point he was doing nearly 70 miles per hour. (TR 55) Agent Cairo, who is associated with the witness in the chase, collided with the Defendant while traveling northbound on 42nd Avenue at which point Defendant continued to drive in an erratic manner. Approximately in front of 17301 N.W. 42nd Avenue, the Defendant threw a white package, plastic bag, with white powder in it out of the car. (TR 55-56) Shortly thereafter, the Defendant's vehicle veered off the road and turned over several times. (TR 56-57) The witness kept his eye on the package that had been thrown out of the car, and instructed Agent Milford to retrieve the package which Agent Milford did within the vision of the witness. (TR 59-60) When the car overturned, additional currency was scattered on the ground and strewn around the wreck. (TR 61)

On cross examination, the witness testified that the investigation had been commenced because of the information provided by the confidential informant. He indicated that the information that was developed was in large, part also from their own investigation of the information given by the informant and the following leads provided by him. (TR 65) The confidential informant had not been used prior

to May 9th by the Drug Enforcement Administration. (TR 65-66) Although, the witness testified that he had been told by an Officer of the Miami Police Department that he had used this informant on previous occasions, and his information had been reliable leading to the arrest of other Defendants in drug related crimes. (TR 66)

The witness testified that during the period of surveillance, approximately eight agents were involved in the viewing of the Cairo home. The witness testified that he left the surveillance at approximately 4:00 a.m. on the morning of the 9th to call an Assistant United States Attorney indicating he would like to apply for a search warrant but no formal application was in fact made. (TR 68-69) When questioned as to his reason for not getting the search warrant, the witness testified:

> "We thought that we were not in a position at that point to get a Federal Judge at 4:00 in the morning, and that it was impractical under the circumstances and that we were going to keep the place under surveillance until we could obtain the search warrant or that the persons were going to take out the cocaine and leave, and we were going to stop and frisk for weapons and search the vehicles." (TR 69)

The cross examination then continued into areas where the information provided by the confidential informant was not reliable. The witness testified that he had been advised that the Defendant would be carrying a gun when in fact, he was unarmed. He was further informed that he had been advised that one Danny Guzewich would be accompanying Mr. Fernandez, when in fact, he did not do that. (TR 70-71) When the witness was specifically asked what his intention

was with regard to Mr. Fernandez, once he was in his vehicle, the witness stated:

> "We were going to stop and frisk him for a weapon. We were not going to search him personally for cocaine. We were going to conduct the search under what I would call the Carroll Doctrine.
>
> QUESTION: For what purpose?
>
> ANSWER: To locate the cocaine.
>
> QUESTION: Locate the cocaine or for the weapon?
>
> ANSWER: For the cocaine.
>
> QUESTION: So you were going to stop the vehicle and search it for cocaine without a warrant and this was your intent all along?
>
> MR. ALTER: I object to that line of questioning as being argumentative.
>
> THE COURT: Sustained." (TR 72)

The witness then admitted that the government vehicles that were following Mr. Fernandez were unmarked vehicles with unexceptional license plates. (TR 73-74) The witness further stated he had no intention of stopping the Defendant for any kind of traffic violation and he was only pulled over to allow the agents to search for the cocaine. (TR 74-75)

The Counsel for Defendant next asked the witness if there was any reason he or his agents did not follow a cadillac that had arrived at the residence and then left the residence after the alleged contraband had arrived. The Government objected to the question and the Court sustained the objection. Counsel for the Defendant requested the right to proffer the materiality, the Court denied the right of the proffer. (TR 77)

The Court then ruled that it had heard enough evidence to make its ruling with connection to the two pending motions. The Court indicated it didn't need argument on the motions stating that it had been provided with cases and the Court understood the positions. (TR 80) The Court, accordingly denied both the Motion to Divulge Confidential Informant and the Motion to Suppress the Evidence. (TR 87) Thereafter, a pre-plea agreement was entered into by the Defendant and the United States Attorney in which the Defendant would enter a plea of guilty to the charge to a maximum two year sentence, reserving at all times material, his right of appeal on questions of the divulgence of the confidential informant and the motion to suppress. (R 26-27) The Court, accepting the pre-plea agreement agreed to accept same and referred same for a pre-sentence investigation. (TR 101) On or about the 19th day of August 1976, Defendant was sentenced to a term of two years incarceration followed by a special parole term of three years. (R 36)

REASONS FOR GRANTING WRIT

-1-

IT IS A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR THE DIVULGEMENT OF A CONFIDENTIAL INFORMANT WHERE NO CLAIM OF PRIVILEGE HAD BEEN MADE BY THE UNITED STATES GOVERNMENT, NOR ANY REPRESENTATION THAT DISCLOSURE OF THE CONFIDENTIAL INFORMANT WOULD ENDANGER THE GOVERNMENT'S INTEREST. DEFENDANT SUBMITS THAT THE DIVULGEMENT OF THE CONFIDENTIAL INFORMANT WAS ESSENTIAL FOR THE INTEREST OF JUSTICE IN THAT HIS MOTION TO SUPPRESS WAS DEPENDENT UPON INFORMATION WHICH COULD ONLY BE PROVIDED THROUGH THE EXAMINATION OF A CONFIDENTIAL INFORMANT.

In the case instanter, the Defendant by Motion, sought the identity of the Government's confidential informant. Testimony was adduced at the hearing on the Motion to Suppress and prior thereto by Motion of Defendant's counsel to the effect that the Defendant believed that the Government's confidential informant had, in fact, procured the illegal act the Defendant was accused of. Although Defendant did not rely on a strict defense of entrapment; i.e. an admission of doing the guilty act, it was the Defendant's position that he had been provided the contraband by

the undercover informant under the guise that it was cash funds to be delivered to a third party in Key West, Florida. The identity therefore, of the confidential informant became essential to the Defendant's position in regard to his Motion to Suppress the evidence, and further, to defend himself and avail himself under his Sixth Amendment rights of confrontation at time of trial. It is a general rule that the Government is privileged to withhold from disclosure the identity of persons who furnish information relating to violations of law to officers charged with enforcing those laws. *Jencks v. United States*, 353 U.S. 657, 1 L Ed 2d 1103, 77 S. Ct. 1007 (1957). See also *Portomene v. United States*, 221 F.2d 582 (5th Cir. Fla. 1955). It is equally true that there is no exact rule with respect to the disclosure of the identity of an informer, and the requirement which is created is a balancing of public policy as opposed to a Defendant's right to properly prepare his defense. Most importantly, it has been held that whether a proper balance renders non-disclosure erroneous depends upon the circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S. Ct. 623 (1957).

In recognizing this balancing test, the most important consideration arises from what is felt to be the fundamental requirements of fairness. In other words, if an informer's identity is relevant and would be helpful to the defense of an accused or would be construed to be essential to a fair determination of the cause, the privilege of non-disclosure must give way. *Portomene v. United States, supra; Cannon v. United States*, 158 F.2d 952 (5th Cir. text 1946).

Perhaps the leading case dealing with the question of disclosure of the identity of a confidential informant is *Roviaro v. United States, supra.* In that case the United States Supreme Court ruled that the District Court, by allowing the Government to withhold disclosure of the identity of it's informer, committed reversible error where the informer, an undercover Government employee, had taken a material part in bringing about the Defendant's possession of the heroin, which was the basis of an indictment charging the Defendant with a violation of the narcotic drugs import and export act.

It was the position of the Defendant in the case at bar that the undercover informer, known only by the name "Juanito" (R 28) had provided him with the contraband under the misapprehension that the bag which in fact contained contraband, contained only currency.

Further, in *Roviaro*, it was indicated that the disclosure of the confidential informant would be proper in the event that he might be a material witness as to whether or not the Defendant knowingly transported the drugs as charged, although *Roviaro* differs from our case in that the undercover informant was the only participant other than the Defendant.

The Court specifically said (353 U.S. 60):

> "The scope of the privilege is limited by it's underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privilege. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the Government withholds the information, dismiss the action."

The Court then went on to specifically say:

> *"Most of the Federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases, the Government has been required to disclose the identity of the informant, unless there was sufficient evidence apart from his confidential communication."* (Emphasis ours)

In the case at bar, the specific requirement of *Roviaro* with regard to this question is evident. In the instant case, the privilege has been upheld where the legality of a search without a warrant was in issue, and further, that the communications of the informer were claimed to establish the probable cause. This becomes more significant in light of the testimony of Government's witness, Harris, on cross-examination when he said that the investigation had commenced solely because of the information provided by the confidential informant. Further, that the information that was developed was in large, based upon the initial lead of the informant. (R 65) The reliability of the informant had

not been used by agents of the Drug Enforcement Administration prior to May 9 (TR 65-66) and the only basis upon which the informant's reliability had been established was that the witness had been told by an unnamed member of the Miami Police Department that he had used the informant on previous occasions and his information had been reliable. (TR 66)

The Count went on in *Roviaro*, in reversing and stating as follows:

> "Doe, (the undercover informant) had helped set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon the petitioner's identity or the identity of the package. He was the only witness who might have testified to the petitioner's possible lack of knowledge of the contents of the package that he transported from the tree to John Doe's car. The desirability of calling John Doe as a witness or at least interviewing him in preparation for trial was a matter for the accused rather than the Government to decide." (353 U.S. 64)

The facts are remarkably similar in the instant case. Although the Defendant testified that another individual by the name of Pablo Cairo had spoken to him about the delivery of the package, the Defendant and counsel, upon inquiry from the Court indicated that said Pablo Cairo had been impossible to contact, his phone had been disconnected, and they had been unable to locate him at his house (R 37-38) in effect, creating the confidential informant as the single witness to the occurrence.

Defendant's right to the divulgement of the confidential informant is further substantiated by the holding of the United States Supreme Court in *Sherman v. United States*, 356 U.S. 269, 2 L.Ed.2d 848, 78 S. Ct. 819 (1958) wherein the Court said that to determine whether the defense of entrapment has been established, a line must be drawn between the trap for an unwary innocent and the trap for the unwary criminal; to make this determination, the accused at trial should be allowed to examine the conduct of the Government agent or informant involved and avail himself of an appropriate and searching inquiry into the conduct of all parties, including himself, his predisposition, and how same relates to his claim of innocence.

The Government, by denying the Defendant the right of the identity of the informer, in effect, deprived the Defendant of either a viable determination on his Motion to Suppress or ultimately would have deprived him of a fair trial. As such, the decision of the trial court with regard to the question of the divulgence of the confidential informant should be reversed and remanded with instructions to divulge the identity as same would be consistent with the holding of the United States Supreme Court in the *Roviaro* decision.

IT IS A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS FOR THE TRIAL COURT TO REFUSE TO ALLOW THE DIVULGEMENT OF THE CONFIDENTIAL INFORMANT WHEN IT WAS APPARENT FROM THE RECORD AND THE TESTIMONY OF DEFENDANT THAT THE CONFIDENTIAL INFORMANT HAD INFORMATION WHICH WOULD TEND TO EXCULPATE THE DEFENDANT.

The proffer to the Court, and the testimony of the Defendant, MANUEL LOUIS FERNANDEZ, indicated that the confidential informant had information which would tend to exculpate the Defendant from criminal responsibility in the charges against him. During the recross of the Defendant on the Motion to Suppress and the Motion for Divulgement of the Confidential Informant, Defendant's counsel responded to the Court's inquiry as to why Juanito was not under subpoena and indicated that the Defendant did not know the full identity of said Juanito and it suspected that the said Juanito was the confidential informant. (R 37-38) Further, in the Motion to Divulge the Confidential Informant, it was indicated to the Court that both Juanito, the suspected confidential informant, and Pablo Cairo had handed the package to the Defendant telling him same was money to be delivered to Julio Mazura in Key West, Florida.

The United States Supreme Court stated in the landmark decision of *Brady v. Maryland*, 83 S. Ct. 1194 (1963) the following:

> "We hold now that the suppression by the prosecution of evidence favorable to the accused upon request, violates due process where evidence is material to either guilt or punishment irrespective of the good faith or bad faith of the prosecution."

The essence of the *Brady* decision was to guarantee to the Defendant a fair trial. It was held by the United States Supreme Court that society wins not only when the guilty are convicted, but when criminal trials are fair. And, it was specifically held in the *Brady* case that criminal trials cannot be fair, if the Government knowingly withholds evidence favorable to a Defendant which could be used to the Defendant's advantage in defense of a criminal prosecution. In the case instanter, the Defendant had alleged certain facts which indicated that the confidential informant had certain information known to the Government which would tend to exculpate him. This evidence could not be proved, or provided by the Defendant in the absence of the Government divulging the identity of the confidential informant. The Court, though realizing same, still denied Defendant the right to the identity of this confidential informant.

Apparently, the Court tended to feel that the evidence may not have been material or material enough to require the Government to disclose the identity of the undercover individual. However, a growing number of courts have recognized that suppressed evidence's materiality and the requirement therefore may be satisfied even though such evidence would do no more than effect the credibility of a witness whose testimony prejudiced the Defendant's case. *Powell v. Wyman*, 287 F.2d 275 (5th Cir. 1961) and by implication in *United States v. McFarland*, 371 F.2d 701 (2nd Cir. 1966).

The Second Circuit Court of appeals expressly recognized the materiality of exculpatory evidence for the purpose of impeachment. In *United States v. Consolidated Laundry Corp.*, 291 F.2d 563 (2nd Cir. 1961) wherein it held that although it was impossible to know whether the result of the trial would have been different, no one could tell what might have happened if the Government's principal witness could have been effectively examined. See also *Giglio v. United States*, 92 S. Ct. 763 (1973). In the case instanter, it is clear that the manner and method by which the Defendant came into possession of the contraband is one which would be crucial to any defense on the question of possession. Certainly, if the Defendant has proffered that the confidential informant had knowledge that would exculpate him from this responsibility, same should have been provided as per *Brady*.

Clearly, the Defendant could not have been in an effective position to prove his guilt or innocence absent the disclosure of the confidential informant and the ability to examine him towards his exculpatory testimony. The non-disclosure of the confidential informant clearly falls within the *Brady* rule. Denial of this Brady material is grounds for a reversal of this conviction, and the instruction to the trial court to require the disclosure of the identity of the confidential informant so that the exculpatory testimony may be adduced by the Defendant.

IT IS A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS AND HIS RIGHTS UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO DENY DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED.

The Fourth Amendment to the United States Constitution indicates that persons have the right to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, said right shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. In the case instanter, an arrest was made in what defendant believes to be grounds constituting less than probable cause without a warrant. The defendant concedes that the existence of probable cause or reasonable grounds justifying an arrest without a warrant may be determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Draper v. United States*, 358 U.S. 307, 3 L.Ed. 2d 327, 79 S. Ct. 329 (1959).

As was held in *Kwong How v. United States*, 71 F.2d 71 (9th Cir. 1934) the determination depends upon the particular evidence and circumstances of each individual case.

Probable cause or reasonable grounds justifying an arrest without warrant, exists only where the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information are

sufficient in themselves to warrant a man of reasonable caution in the belief that a narcotics offense has been or is being committed. *Draper v. United States, supra.* See also *Hernandez v. United States*, 17 F. 2d 373 (9th Cir. Cal: 1927). It is equally established law that mere suspicion or conjecture is not sufficient to establish probable cause or reasonable grounds, nor is good faith on the part of the arresting officer. *Worthington v. United States*, 166 F.2d 557 (6th Cir. Mich. 1948). Probable cause for arrest depends on the particular facts known to the arresting officer before or at the time of the arrest. What develops after the arrest cannot be used in determining whether the arresting officer at the time of the arrest had probable cause. *Johnson v. United states*, 333 U.S. 10 (92 L. Ed 436, 68 S.Ct. 367, 1948).

In the case instanter, it was the position and is the position of the Defendant that the arrest occurred in this case without probable cause at the time the DEA agents in the unmarked cars stopped the Defendant, surrounded his vehicle, and caused a restraint upon his freedom. As such, the validity of the arrest without a warrant, where no probable cause existed at the time of the arrest, becomes of paramount importance, irrespective of the nature of the fruits of the search made incidental to the arrest. *United States v. Walker*, 246 F.2d 519 (7th Cir. Ill. 1957).

Defendant recognizes that there is a distinct difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest. In assessing, whether a DEA agent as in the instant case has probable cause within the meaning of the Fourth Amendment and reasonable grounds within the meaning of the applicable Statutes, evidence within the knowledge of the agent may be considered even though the evidence is not

legally competent evidence in a criminal trial. *Draper v. United States, supra.* Consequently, the agent's knowledge may be based on hearsay evidence. However, where the agent's knowledge is based upon reliance on an informer, a different set of circumstances are established. It has been held that information obtained from an informer, though pertinent, does not necessarily establish probable cause or reasonable grounds particularly where it comes from an anonymous source or is unverified. *Johnson v. United States, supra.*

Information furnished by a reliable informer has been held not to constitute probable cause where it is not shown that such information was itself not more than mere guesswork or speculation.

A case closely on point with the instant case, is *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed 2d 142, 85 S. Ct. 223 (1964). In that case the Court said:

> "An arrest without a warrant bypasses the safeguards provided by an object predetermination of probable cause, and substitutes instead the far less reliable procedure of an after the event justification for the arrest or search, too likely too subtly influenced by the familiar shortcomings of hindsight judgment. Whether or not the requirements of reliability and, particularly, of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent from where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed. See also *Wong Sun v. United States*, 471, 9 L.Ed. 2d 441, 83 S. Ct. 407 (1961)."

In the case instanter a surveillance was maintained of the residence for a period in excess of seven (7) hours after the allegedly reliable confidential informant had tipped the agents to the alleged presence of contraband in the premises. During this period of time, there was ample opportunity for the DEA agents to obtain a search warrant, and their failure to do so, was predicated only upon the statement of agent Harris, that it was impractical to awaken a Federal Judge to get a warrant.

The Court, in reversing the lower court's finding in the *Beck* case, said the following:

> "It is possible that an informer did in fact relate information to the police officer in this case, which constituted probable cause for the petitioner's arrest. But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case, what the informer had actually said, and why the officer thought the information was credible. . ."

In the case instanter there are no facts on the record to show why anything was considered credible, and further, that many of the things that had been indicated by the informer, did not come to pass, such as the second individual following the first individual and that all individuals concerned would be armed.

It is clear that if a Defendant has been unconstitutionally arrested or detained, or evidence obtained as a result of an arrest or detention, it is not admissable. *Beck v. Ohio, supra.* Any physical evidence seized at or after the

time of arrest, the validity of the seized evidence without warrant will depend solely on the viability of the arrest. *Sibron v. New York*, 392 U.S. 40 (1968).

In particular situation, as in the case instanter, where a Defendant is approached or accosted, and where an incidental object is thrown away, an illegal search accrues if the Defendant had been illegally arrested or detained prior to the time of the alleged drop. *Williams v. United States*, 237 F.2d 789 (D.C. Cir. 1956).

The United States Supreme Court dealt specifically with this question in *Rios v. United States*, 364 U.S. 253 (1960). In that case, the Court said in response to the Defendant's argument that there had been an illegal detention without probable cause as follows:

> "If therefore, the arrest accrued when the officers approached the doors of the taxicab, then nothing that happened could justify the search as its incident . . . the validity of a search thus turns upon the question of when the arrest occurred. . ."

In the case instanter, it is clear that the arrest occurred when the freedom of movement of the Defendant was stifled by the agents cutting him off and attempting to restrain his freedom of movement. Therefore, consistent with the Supreme Court's recognition in *Preston v. United States*, 376 U.S. 364 (1964), searches of an automobile had to meet the test of reasonableness of the Fourth Amendment, and evidence obtained as a result of such searches were admissable only in those instances. See *Schimmel v. California*, 395 U.S. 752 (1969).

Where the police, as in the instant case, cause a situation whereby evidence is brought into plain view where in advance, that might have been obtained by a warrant, these actions are not acceptable and the evidence should have been suppressed by the trial court.

CONCLUSION

Based upon the cases, authorities and policy cited herein, the Defendant respectfully urges this Court to reverse the judgment and sentence of the trial court and remand this cause to the trial court for appropriate disposition.

RESPECTFULLY SUBMITTED,

ALVIN E. ENTIN, ESQ.
Attorney for Petitioner
2020 N.E. 163 St. Suite 300
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Tel: (305) 944-9100

MANUEL W. JAMES, ESQ.
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La Concha Building
Key West, FL 33040
Tel: (305) 296-9515

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by mail to the United States Attorney, 300 Ainsley Building, Miami, FL this _____ day of _____, 1977.

ALVIN E. ENTIN, ESQ.

Supreme Court, U. S.
FILED
NOV 21 1977
MICHAEL RODAK, JR., CLERK

in the
Supreme Court
of the United States

CASE NO: 77-851

MANUEL LOUIS FERNANDEZ,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

MANUEL W. JAMES, ESQ.
Attorney for Petitioner
La Concha Building
Key West, FL 33040

ALVIN E. ENTIN, ESQ.
Attorney for Petitioner
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Tel: (305) 944-9100

UNITED STATES of America,
Plaintiff-Appellee,

v.

Manuel Louis FERNANDEZ,
Defendant-Appellant.

No. 76-3434.

United States Court of Appeals,
Fifth Circuit.

Aug. 4, 1977.

On appeal from orders of the United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., denying motions to suppress and to divulge the identity of a confidential informant, the Court of Appeals, Gee, Circuit Judge, noting that the issues were nonjurisdictional and were pursued after defendant had entered a plea of nolo contendere, held that district courts should not receive pleas of guilty or nolo contendere if they are coupled with an agreement that the defendant may nevertheless appeal on non-jurisdictional grounds.

Affirmed pursuant to Local Rule 21.

Criminal Law — 273(1), 275

District courts should not receive pleas of guilty of nolo contendere if they are coupled with an agreement that defendant may nevertheless appeal on nonjurisdictional grounds.

Appeal from the United States District Court for the Southern District of Florida.

Before CLARK and GEE, Circuit Judges, and MARKEY,* Chief Judge.

GEE, Circuit Judge:

This case presents an appeal of a denial of a motion to suppress and motion to divulge the identity of a confidential informant. The more important aspect of the case is that these issues are non-jurisdictional and were pursued after the defendant entered a plea of nolo contendere. In United States v. Sepe, 486 F.2d 1044 (5th Cir. 1973) (en banc), the en banc court said in unequivocal terms:

> [A]s a matter of policy this court disapproves the practice of accepting pleas of guilty or nolo contendere if they are coupled with agreements that the defendant may nevertheless appeal on nonjurisdictional grounds.

We repeat this admonition: prosecutors and district courts are reminded of our statement in Sepe and the district courts are directed to cease receiving pleas so conditioned.

Nevertheless, in light of the isolated incidence of this violation and the substantial expenditure of effort on the part of all the parties concerned with this case, we proceed to the merits. AFFIRMED pursuant to Local Rule 21.[1]

*Of the U.S. Court of Customs and Patent Appeals, sitting by designation.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 76-250-Cr-CA

UNITED STATES OF AMERICA

vs.

MANUEL LOUIS FERNANDEZ

ORDER ON MANDATE

[Filed Nov 2 1977]

The Clerk of this Court having received and filed on October 14, 1977, the Mandate issued by the United States Court of Appeals for the Fifth Circuit on October 12, 1977, on the appeal taken by the defendant herein, wherein the judgment of this Court was affirmed, it is therefore

ORDERED and ADJUDGED that the Mandate of the United States Court of Appeals for the Fifth Circuit be, and the same is, hereby made the order of this Court; and that the defendant, MANUEL LOUIS FERNANDEZ, surrender himself to the United States Marshal for this District on or before November 18, 1977 at 10:00 A.M. to begin serving the sentence imposed by this Court on August 16, 1976. It is further

ORDERED and ADJUDGED that, if the defendant fails to surrender himself to the United States Marshal

for this District on or before the above-mentioned date, the bond posted in this cause is to be estreated, and the Clerk shall issue a warrant for the arrest of the defendant forthwith.

DONE and ORDERED at Miami, Florida, this 2nd day of November 1977.

/s/ C Clyde Atkins
UNITED STATES
DISTRICT COURT

cc: U. S. Attorney (2)
U. S. Marshal (2 cert.)
Chief Probation Officer
Special Agent Gaston Cairo, DEA
Alvin E. Entin, Esq.
Manuel Louis Fernandez
Allegheny Mutual Casualty Co.
Frank McGogy, Allegheny Ins. Co.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3434

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MANUEL LOUIS FERNANDEZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

[Filed Oct 25 1977]

(✓) The motion of APPELLANT for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

( ) The motion of _____ for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____ the stay to continue in force until the final disposition of the case by the

Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Thomas Gibbs Gee
UNITED STATES
CIRCUIT JUDGE

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
October 12, 1977
EDWARD W. WADSWORTH
CLERK
600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

Mr. Joseph I. Bogart, Clerk
U. S. District Court
P.O. Box 010669
Flagler Station
Miami, FL 33101

No. 76-3434 USA v. Manuel Louis Pernandez
(Dist. Ct. No. 76-250-CR-CA)

Dear Sir:

(XX) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above

cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(XX) Copy of the Court's opinion.

(XX) Original record on appeal or review. (2 vols)

( ) Original exhibits.

( ) Bill of Costs approved by this Court.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By Susan M. Gravois
Deputy Clerk

enc. (LETTER ONLY)
cc: Mr. Alvin E. Entin
Mr. Manuel W. James
Messrs. Stephen M. Pave
James E. McDonald

Supreme Court, U. S.
FILED
MAR 24 1978
MICHAEL RODAK, JR., CLERK

No. 77-851

In the Supreme Court of the United States

OCTOBER TERM, 1977

MANUEL LOUIS FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
SIDNEY M. GLAZER,
KATHLEEN A. FELTON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-851

MANUEL LOUIS FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 556 F. 2d 1246.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1977. The petition for a writ of certiorari was filed on November 21, 1977 and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion for disclosure of a confidential informant's identity was properly denied.

2. Whether a package of cocaine that petitioner had thrown out of a vehicle should have been suppressed as evidence.

STATEMENT

Petitioner was charged in an indictment filed in the United States District Court for the Southern District of Florida with possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841 (a)(1). He pleaded *nolo contendere* pursuant to an agreement with the government that he would have a right to appeal the denial of his pretrial motions to suppress evidence and to disclose the identity of a government informant. He was sentenced to a two-year term of imprisonment, to be followed by a three-year special parole term. The court of appeals, although expressing disapproval of plea agreements purporting to preserve non-jurisdictional issues for appeal, affirmed on the merits (Pet. App. 1–2).

The evidence at the hearing on petitioner's pretrial motions showed that the residence of one Pablo Cairo had been under surveillance by agents of the Drug Enforcement Administration (DEA) on May 7, 8, and 9, 1976 (Tr. 41). A confidential informant was assisting the DEA in its investigation and was inside the residence on the evening of May 8. This informant had been introduced to the DEA agents by an officer of the Miami Police Department and was represented

as having provided reliable information in the past which had led to arrests for drug-related crimes (Tr. 66). Petitioner's jeep, which had been seen parked at the house on the 7th, was also seen there on the night of May 8th (Tr. 43). In the course of the evening, the federal agents observed various persons enter and leave the house (Tr. 41).

At approximately 1:00 a.m. on May 9, the informant left the house and told the DEA agents that a delivery of cocaine had just been made to the Cairo residence and that petitioner and another person, Dan Guzewich, would be leaving shortly to deliver it to customers at a nearby motel. He stated that the two people would take separate cars, that one would be the jeep, and that both persons would be armed (Tr. 45–46). Shortly thereafter, the agents observed Guzewich leave the house and retrieve an object which appeared to be a firearm from a car parked in the driveway. At 6:30 a.m. the agents observed a person who appeared to be petitioner, according to the description given them by the informant, leave the house, get into the jeep, and drive away (Tr. 48–51).

The DEA agents followed in three cars, and as the jeep entered the access road to an expressway, two of the government cars drove up on either side of petitioner's vehicle, while the agent driving the third car turned on a light attached to the roof of his car. Petitioner initially slowed down, then abruptly made a U-turn hitting one of the DEA vehicles, and proceeded back the wrong way on the access road (Tr. 51–54).

The agents continued their pursuit as petitioner travelled at speeds up to 70 miles an hour. At one point,

petitioner threw a transparent plastic bag containing white powder from his vehicle (Tr. 55–58). The chase ended about 200 feet farther on, after petitioner's vehicle struck a parked car and then collided with one of the government cars. The agents retrieved the bag, and on subsequent examination it was found to contain nearly half a kilogram of cocaine (Tr. 59–60, 100–101).

ARGUMENT

1. Petitioner contends (Pet. 13–21) that the district court erred in denying his pre-trial motion for disclosure of the identity of the government's confidential informant. Relying on *Roviaro* v. *United States,* 353 U.S. 53, petitioner claims that the identity of the informant was essential to his defense that the informant gave him the package of cocaine and told him it was a quantity of money which was to be delivered to a friend (Tr. 28). Petitioner claimed that the informant was the only other available witness to this conversation, although he admitted that both the informant and Cairo had actually given him the package (Tr. 30). That claim is insubstantial.

Petitioner recognizes (Pet. 14) that he has no absolute right to disclosure of the informant's identity. Rather, *Roviaro* establishes (353 U.S. at 62) that

> no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case,

> taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

The circumstances of this case support the denial of petitioner's motion to disclose. Petitioner made no convincing showing of his need to know the informant's identity. First, his claim that he thought that the transparent plastic bag contained money rather than cocaine powder, and that the informant might substantiate that claim, is inherently incredible and completely at odds with his flight from the agents and his abandonment of the bag. Second, unlike *Roviaro,* the informant was not the only witness to the transaction in question; according to petitioner's own version of events, both the informant and Cairo had asked him to deliver the alleged money, and the record reveals that petitioner's attempts to locate Cairo, with whom petitioner was fairly well acquainted, were at best half-hearted (Tr. 36–38, 64, 87).

Petitioner's further contention (Pet. 16) that the identity of the informant was necessary to enable him to establish the agents' lack of probable cause for arresting him is answered by *McCray* v. *Illinois,* 386 U.S. 300, in which, on similar facts, the Court held that the prosecution need not disclose the identity of the informant who supplied the requisite probable cause, so long as the agents who acted on the information were available to testify at the suppression hearing.[1]

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[1] There is no merit to petitioner's further contention (Pet. 19–21) that failure to disclose the informant's identity violated

2. Petitioner also argues (Pet. 22–27) that the evidence against him, the package of cocaine, should have been suppressed. Petitioner claims that he was arrested when the agents first surrounded his car, that there was no probable cause for the arrest because there was insufficient basis for the agents to believe that the informant was reliable, and that the cocaine should be suppressed. Those claims are unfounded.

First, petitioner errs in assuming that the agents required probable cause in order to continue their investigation by stopping petitioner's automobile. Such a stop may be made, consistent with the reasonableness requirement of the Fourth Amendment, on the basis of a founded suspicion of criminal activity (see *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 879–880), and there can be no question that the information known to the agents at the time they attempted to stop petitioner's vehicle was ample to satisfy that requirement. Petitioner's subsequent high-speed flight served only to confirm their information and to provide ample probable cause for the ultimate arrest even if it was lacking initially.

Second, even if the initial attempt to stop were deemed an arrest, the agents had probable cause. The

Brady v. *Maryland*, 373 U.S. 83. There is no support in the record for petitioner's bare assertion that the informant possessed exculpatory information and that the prosecution knew it. Mere speculation as to the possible existence of exculpatory information in the government's possession does not establish a *Brady* violation or entitle a defendant to wholesale disclosure of information in the government's possession. *United States* v. *Davis*, 487 F. 2d 1249, 1250–1251 (C.A. 5); *United States* v. *Gonzalez*, 466 F. 2d 1286, 1288 (C.A. 5). Moreover, as noted, petitioner's alleged defense is plainly contrary to the evidence.

facts here are considerably stronger than those in *Draper* v. *United States,* 358 U.S. 307, where an arrest based on information supplied by an informant was upheld. Here, as in *Draper,* the agents had reason to believe that the informant had provided reliable information in the past. But here, unlike *Draper,* the agents also knew the basis for the informant's information—namely, his presence in the house with petitioner and his confederates when a supply of cocaine arrived.

Moreover, as in *Draper,* the agents in this case were able to verify much of the information given them. On May 7, the informant gave the agents a description of petitioner's vehicle, and they observed that vehicle parked at the Cairo residence both on the 7th and 8th of May. He said that petitioner and Dan Guzewich would be leaving with the cocaine, and that they would be armed. The agents later observed Guzewich leave the house and take what appeared to be a gun from his car. And at 6:30 a.m. they saw a person matching the informant's description of petitioner leave the house and drive off in the jeep, just as they had been told. At that point, the agents were justified in relying on the information they knew to be based on their informant's personal observations to conclude that illegal activity was quite probably taking place.

Petitioner's reliance on *Beck* v. *Ohio*, 379 U.S. 89, is misplaced, since the facts in that case were substantially different. In *Beck*, the officer testified only that he had some vague "information" concerning the defendant and could not even specify the source of those reports. He had no information indicating that

he would be able to find the defendant at the particular place where he arrested him, nor could the officer point to any specific reason for believing that at the time of the arrest defendant had acted or was acting unlawfully. See 379 U.S. at 93–94.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
SIDNEY M. GLAZER,
KATHLEEN A. FELTON,
Attorneys.

MARCH 1978.

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[2] In any event, it is questionable whether the seizure of the cocaine, which petitioner threw from his car during the chase, should be considered the "fruit" of any stop or arrest within the meaning of the exclusionary rule. A person has no Fourth Amendment rights with respect to the seizure of property that he has abandoned. See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217, 241. A criminal's decision to jettison contraband during a chase in order to prevent its discovery may be a "fruit" of the attempted stop in a strictly "but for" sense, but it is also the product of an intervening act (his own decision) that might be viewed as a break in the causal chain (see *Brown* v. *Illinois*, 422 U.S. 590); it is difficult to see what deterrence purposes would be served by extending the exclusionary rule to such "fruits". There is, however, no occasion to reach this issue on the facts of the present case.

U.S. GOVERNMENT PRINTING OFFICE: 1978